

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN L. RYAN and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

*Docket No. 98-443; Submitted on the Record;
Issued September 8, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective May 26, 1996 based on his capacity to earn wages as a part-time telemarketer.

On April 16, 1963 appellant, then a 26-year-old mail carrier, sustained an employment-related back strain; on April 25, 1963 appellant returned to work. He sustained a recurrence of disability beginning March 25, 1974 and received appropriate compensation from the Office.¹ Appellant returned to limited-duty work for the employing establishment on April 4, 1983 and stopped work on June 26, 1985. The Office accepted that appellant sustained an employment-related herniated disc at L4-5 and authorized a hemilaminectomy, disc excision and fusion at L4-5.² By decision dated May 29, 1996, the Office reduced appellant's compensation effective May 26, 1996 based on his capacity to earn wages as a part-time telemarketer. The Office determined that appellant was vocationally and medically capable of working on a part-time basis as a telemarketer and that the position represented his wage-earning capacity. By decision dated February 12, 1997 and finalized on February 14, 1997, an Office hearing representative denied modification of the Office's May 29, 1996 decision.³

¹ Appellant retired from the employing establishment effective March 25, 1974

² Between March 1974 and April 1983, appellant worked intermittently for various private employers. In September 1976, the Office reduced appellant's compensation to reflect his wage-earning capacity based on his actual wages as an advertising salesman.

³ Appellant has another appeal (Docket No. 98-1819) before the Board. Appellant appealed a March 9, 1998 Office decision regarding the method of recovery of a \$73,991.90 overpayment. In his February 12, 1997 decision, the Office hearing representative indicated that the Office should reexamine the method of recovery of the overpayment; this matter was not before the Office hearing representative at the time and is addressed in the Office's March 9, 1998 decision.

The Board finds that the Office improperly reduced appellant's compensation effective May 26, 1996 based on his capacity to earn wages as a part-time telemarketer.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances, which may affect his wage-earning capacity in his disabled condition.⁶ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁷ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁸

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁹

In the present case, the Office referred appellant to a vocational rehabilitation counselor, who determined that appellant was vocationally and educationally able to perform the telemarketer position. The Board finds, however, that the Office did not meet its burden of proof

⁴ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁵ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. 8115(a).

⁷ *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

⁸ *Id.*

⁹ *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

to establish that appellant was physically capable of performing the telemarketer position effective May 26, 1996, the date that it adjusted his compensation.

The Office appears to have relied on an April 22, 1994 report of Dr. Malcolm A. Meyn, Jr., a Board-certified orthopedic surgeon, to whom it referred appellant for evaluation. However, this report is of limited probative value on the relevant issue of the present case in that it contains an opinion on appellant's ability to work, which is equivocal in nature.¹⁰

In his April 22, 1994 report, Dr. Meyn reported the findings of his examination on April 11, 1994. Dr. Meyn stated:

"It is my opinion that [appellant] is not capable of remunerative employment at this time because of the marked limitations imposed by his lower back condition. These limitations would be no sitting over one-half hour without being allowed to stand. Total amount of sitting in an eight-hour day is four hours. No standing more than 10 minutes without being allowed to sit. Total amount of standing in [an] eight-hour day is less than one hour. Walking is less than 15 minutes at a time. In addition, there should be lifting restrictions of no repetitive lifting from the floor over 5 pounds and no occasional lifting from knees to chest over 15 pounds."

Dr. Meyn indicated that appellant also had problems with his cervical spine that might require further work restrictions.¹¹ Dr. Meyn's opinion is equivocal in that he indicates that appellant is unable to perform remunerative work, provides restrictive work limitations and suggests that additional work restrictions will be necessary. Moreover, it is unclear whether the limitations on sitting and standing that Dr. Meyn recommended would allow appellant to perform the telemarketer position as currently described.

In addition, the record contains other medical evidence, which shows that appellant was unable to perform the telemarketer position. In a report dated December 22, 1995, Dr. A.A. Huesman, an attending Board-certified family practitioner, stated:

"I fully agree with Dr. Meyn that [appellant] is not capable of remunerative employment and, in addition, I must point out that the report or examination given [appellant] was done on April 22, 1994, some 20 months ago.

"It is my opinion that [appellant's] condition has in no way improved but has further worsened causing additional medications to be utilized for pain and comfort."

¹⁰ See *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956) (finding that an opinion, which is equivocal or speculative is of limited probative value regarding the issue of causal relationship).

¹¹ Dr. Meyn stated that appellant had reached maximum medical improvement and no longer needed any additional orthopedic treatment, physical therapy or neurosurgical treatment in connection with his lower back condition.

Dr. Huesman indicated that appellant also suffered from severe cervical spine problems and had cardiac, hiatal hernia and eye conditions. He noted, “[a]t this time, I am in agreement with Dr. Meyn that [appellant] is not capable of remunerative employment due to his spinal condition further complicated with his cervical problem and heart problem/hiatal hernia condition

Moreover, it should be noted that Dr. Meyn’s evaluation was performed more than two years prior to the adjustment of appellant’s compensation. The record does not contain any medical report from around the time of the adjustment of appellant’s compensation, which outlines appellant’s work restrictions or otherwise shows that appellant was physically capable of performing the telemarketer position.

Therefore, the Office did not properly consider all the relevant factors, including appellant’s physical limitations, in basing appellant’s wage-earning capacity on the position of telemarketer and the Office improperly adjusted appellant’s compensation effective May 26, 1996.

The decision of the Office of Workers’ Compensation Programs dated February 12, 1997 and finalized on February 14, 1997 is reversed.

Dated, Washington, D.C.
September 8, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member